IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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SUPREME COURT, U.S.

HAROLD LAMONT OTEY,	)	NO.
	)	
Petitioner,	)	
	)	
vs.	)	AFFIDAVIT IN SUPPORT OF MOTION
	)	TO PROCEED IN FORMA PAUPERIS
THE STATE OF NEBRASKA,	)	
	)	
Respondent.	)	

I, Harold Lamont Otey, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed by petition for writ of certiorari to the Supreme Court of the State of Nebraska without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor and that I believe I am entitled to redress.

That I was convicted by the District Court of Douglas County, Nebraska at trial by jury of one count of First Degree Murder in the perpetration of a sexual assault in the First Degree and was sentenced to death on the charge. I am presently incarcerated in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska.

That in the District Court of Douglas County, Nebraska, I requested the Court to appoint counsel since I was unable to afford the cost of an attorney or other costs arising out of the charges against me and that the Douglas County District Court did, upon my request, appoint the Douglas County Public Defender's Office to represent me in the matter of the criminal charges pending against me.

That upon my appeal to the Supreme Court of Nebraska, I was represented by a second court appointed attorney since I was unable to bear the costs of continued legal action in this case.

That upon my filing of an application for post conviction relief in the District Court of Douglas County, Nebraska I requested

the Court to appoint counsel since I was unable to afford the costs of an attorney or other costs arising out of the charges against me and the Douglas County District Court did, upon my request, appoint a third attorney to represent me.

That upon my appeal to the Supreme Court of Nebraska from the denial of my motion for post conviction relief I was represented by the same court appointed attorney.

Because of my present incarceration in the Nebraska Penal and Correctional Complex, I am not employed nor do I have any cash or assets with which to finance proceedings in my case.

I understand that false statements in this Affidavit will subject me to penalties for perjury.

Harold Lamont Otey
HAROLD LAMONT OTEY

SUBSCRIBED AND SWORN to before me this 26th day of August, 1982.

GENERAL NOTARY - State of Nebraska
JAMES R. LYONS
My Comm. Exp. July 7, 1983

James R. Lyons
Notary Public

1486

THE STATE OF NEBRASKA,	Plaintiff,		INFORMATION: First Degree Murder While In The Commission Of A Crime
vs.		101-489	
Harold Lamont Otey,	Defendant.		

Public Defender is appointed to represent the defendant.

Defendant present with counsel; defendant adknowledges receipt of Information. Defendant arraigned and stood mute. Plea of Not Guilty entered for defendant.

Defendant remanded to custody of Sheriff.

JOHN T. GRANT, JUDGE

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	
	)	
Appellee,	)	
	)	
v.	)	DOCKET 101 NO. 489
	)	
HAROLD LAMONT OTEY,	)	O R D E R
	)	
Appellant.	)	

Pursuant to the direction of the Supreme Court of Nebraska, the District Court of Douglas County appoints S. J. Albracht, 460 Continental Building, Omaha, Nebraska to represent defendant herein with regard to further matters in this case.

Dated this 24th day of August, 1978.

BY THE COURT:

John S. Grant

Judge

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,
v.
HAROLD LAMONT OTEY,
Defendant.

DOCKET 101 NO. 489

ORDER

Now on this 6th day of June, 1979, the Court Orders filed: (1) a "MOTION FOR RE-APPOINTMENT OF COUNSEL", received by the Court on or about November 16, 1978; (2) a letter-request to S.J. ALBRACHT, Attorney, Dated November 16, 1978 and handed to the Court on or about November 20, 1978; and (3) a letter addressed to the Court Administrator dated May 29, 1979.

The Court considered the letter of November 16, 1978 as a request to vacate the Motion dated November 15, 1978 sent to the Court, and therefore neither document was ever filed. In view of defendant's letter of May 29, 1979, the Court now overrules defendant's Motion for Re-appointment of Counsel.

Dated this 6th day of June, 1979.

BY THE COURT:

John J. Grant
Judge

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	
	)	
Plaintiff,	)	
	)	Docket 101 No. 489
v.	)	
	)	O R D E R
HAROLD LAMONT OTEY,	)	
	)	
Defendant.	)	

Michael L. Schleich, Attorney at Law, 475 Continental Building, Omaha, Nebraska, 68102 is hereby appointed to represent defendant Harold Lamont Otey in his post-conviction proceedings.

Copies of this Order have been sent to counsel of record and to defendant Harold Lamont Otey on this date.

Dated this 30th day of September, 1980.

BY THE COURT:

John T. Grant
Judge

THE STATE OF NEBRASKA,	Plaintiff,	101-489	INFORMATION: First degree murder while in the commission of a crime
vs			
Harold Lamont Otey,	Defendant,		

State present by counsel; defendant present by counsel.

Defendant's motion for new trial argued and submitted.

Motion for new trial denied.

Michael Schleich appointed to represent defendant in further appeals.

Leave granted to defendant to proceed in forma pauperis on appeal.

JOHN T. GRANT; JUDGE

THE STATE OF NEBRASKA,)
) SS.
COUNTY OF DOUGLAS.)

I, RUDY J. TESAR, Clerk of the District Court, Fourth Judicial District of Nebraska, within and for said County, do hereby certify that the above and foregoing are true and correct copies of ORDER dated February 9, 1978, ORDER dated August 24, 1978. ORDER dated June 6, 1979, ORDER dated September 30, 1980 and ORDER dated October 23, 1981 filed for and entered of record and designated as Crimina Docket 101 Number 489,

in a cause in said Court wherein THE STATE OF NEBRASKA, is Plaintiff,

and HAROLD LAMONT OTEY, is Defendant.

as the same appears fully upon the records and in the files of said Court now in my charge remaining as Clerk aforesaid.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Omaha, Nebraska, this 27th day of August A. D. 1982

RUDY J. TESAR
Clerk

BY Robert J. Lovato
Deputy

STATE V. OTEY

NO. 81-768 - filed July 2, 1982.

1. Post Conviction: Appeal and Error. It is well established that one seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous.

2. Post Conviction. A motion for post conviction relief may be heard without requiring the production of the prisoner.

3. Effectiveness of Counsel. In order for one to maintain a claim of ineffective counsel, the record must affirmatively support the claim.

4. ____. The two-part test to determine whether an attorney has effectively counseled a criminal defendant is that counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region and must also conscientiously protect his client's interests.

5. Effectiveness of Counsel: Proof. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.

6. Effectiveness of Counsel: Witnesses: Testimony. A claim of prejudice based upon an alleged failure to call witnesses is not sustained in the absence of evidence as to what the witnesses' expected testimony would be.

APPENDIX "A"

Heard before Krivosha, C.J., Boslaugh, McCown, Clinton, White, Hastings, and Caporale, JJ.

PER CURIAM.

The defendant, Harold Lamont Otey, appeals from the order of the District Court denying his motion for post conviction relief.

In 1978 the defendant was convicted of first degree murder in the perpetration of a sexual assault and sentenced to death. The judgment was affirmed by this court in State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979).

On September 23, 1980, he filed a motion in the District Court for post conviction relief. An evidentiary hearing was held on June 29, 1981. The defendant was not present at this hearing but his testimony was received by deposition. The motion was denied on September 24, 1981.

The defendant contends it was error for the trial court to refuse to permit the defendant to attend the hearing, and that the record shows he was denied the effective assistance of counsel at the original trial.

It is well established that one seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. State v. Paulson, 211 Neb. 711, ____ N.W.2d ____ (1982).

Neb. Rev. Stat. § 29-3001 (Reissue 1979) provides

that a motion for post conviction relief may be heard "without requiring the production of the prisoner." In State v. Woods, 180 Neb. 282, 142 N.W.2d 339 (1966), we held that although a prisoner could not be prevented from testifying in support of his motion, he had no right to be personally present at an evidentiary hearing on the motion. See, also, State v. Wells, 197 Neb. 584, 249 N.W.2d 904 (1977), and Davis v. State, 51 Neb. 301, 70 N.W. 984 (1897), relating to the right to be present at the hearing on a motion for a new trial.

We conclude it was not error for the trial court to require that the defendant's testimony be presented by deposition.

The defendant alleges he was deprived of the effective assistance of counsel because his trial counsel failed to adequately prepare for trial; failed to request that all stages of the proceeding be recorded and transcribed; advised the jury that the defendant would testify in his own behalf when in fact that decision had not been made or discussed with the defendant; and failed to object to the introduction of photographs offered by the State.

The defendant had the burden to show that his trial counsel did not perform at least as well as one with ordinary criminal law skill and training and that he was prejudiced by the action or inaction of his counsel. The rule was stated in State v. Journey, 207 Neb. 717, 723, 301 N.W.2d 82, 87 (1981), as follows: "Nebraska employs a two-part test for determining whether an attorney has effectively

counseled a criminal defendant. First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests. State v. Leadinghorse, 192 Neb. 485, 222 N.W.2d 573 (1974); State v. Lang, 202 Neb. 9, 272 N.W.2d 755 (1978). A defendant challenging competency of counsel has the burden to establish it. State v. Auger & Uitts, 200 Neb. 53, 262 N.W.2d 187 (1978). In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. State v. Mays, 203 Neb. 487, 279 N.W.2d 146 (1979); State v. Lang, supra; State v. Bartlett, 199 Neb. 471, 259 N.W.2d 917 (1977)."

As we said in State v. Meredith, post p. ____, ____ N.W.2d ____ (1982), in order for one to maintain a claim of ineffective counsel, the record must affirmatively support the claim.

The assistant public defender who represented the defendant at the trial testified at the evidentiary hearing on the motion that he consulted with the defendant approximately a dozen times before trial. He discussed the police reports with the defendant and asked him for the names of witnesses, what his side of the story was, and if he had an alibi. With regard to the stereo which had been stolen from the victim's apartment, the defendant gave counsel three different stories, all conflicting.

In State v. Holtan, 205 Neb. 314, 287 N.W.2d 671 (1980), we pointed out that the adequacy of counsel cannot be determined solely on the basis of the amount of time spent interviewing the defendant. As in that case, the defendant in this case has failed to show how, had counsel discussed the case with the defendant any more than he did, anything different would have occurred.

In regard to witnesses, the defendant gave his counsel the "nicknames of people scattered all over the country." The defendant did not provide names and addresses of witnesses or tell his counsel what would be the testimony of these people. In the absence of evidence as to what the witnesses would have testified to, the defendant failed to establish prejudice.

The defendant's counsel further testified that he did not know whether the defendant would testify at the trial, so in his opening statement counsel told the jury that the defense would be able to explain the many confessions the defendant had made, but did not state how the explanation would be made. Counsel testified that he hoped the defendant would not testify because the defendant had made many conflicting statements and counsel was unsure what the defendant would say. Counsel was of the opinion that it would not have been to the defendant's benefit if he had testified.

The defendant relies in part upon a newspaper account of the trial as proof that the defendant's counsel

told the jury in his opening statement that the defendant would testify. The newspaper account does not quote counsel verbatim and, apparently, was the newspaper reporter's interpretation or conclusion from the remarks of counsel in the opening statement.

There is no requirement, in the absence of a request, that all stages of the proceeding be recorded, and the defendant has made no showing of prejudice of any kind other than in regard to his claim concerning the alleged statement of counsel in his opening statement.

The photographs which the defendant claims should have been objected to were admissible. Counsel may have believed it to be to the defendant's advantage as a matter of trial strategy to not object to evidence which was admissible.

In his deposition the defendant claims that he could have called "a host of character witnesses" at his sentencing hearing if he had known that he had a right to present such evidence. Again, there is no showing as to names and addresses of witnesses, or what they would testify to, other than perhaps a woman known only as "Shirley" with whom the defendant had stayed on several occasions.

In State v. Landers, ante p. ____, ____, ____ N.W.2d ____, ____ (1982), we said: "In State v. Holtan, supra [205 Neb.] at 321, 287 N.W.2d at 676, we said: '[T]he defendant maintains that counsel was inadequate in that he did not subpoena witnesses from the state of Washington who

would have testified as to his good character. The record, however, fails to disclose what, if anything, the witnesses would have testified to had they been called. What they might have testified to at best was the defendant's hope and wish. In the absence of evidence to disclose what the witnesses would have testified to, we are unable to establish any prejudice and therefore unable to establish any error.' Likewise, in State v. Kelly, supra, where the defendant claimed that his attorney had failed to interview and obtain witnesses to establish a defense based on consent, we said at [190 Neb.] 44, 205 N.W.2d at 648: 'The defendant utterly failed to establish this allegation. None of the four witnesses identified by him as supporting this defense were called to testify at this hearing nor was their failure to be called as witnesses explained. There was an utter lack of corroboration of the allegation and contention that neither force nor nonconsent were involved in his admitted sexual act with the prosecutrix.'"

The evidence in this case falls far short of that required to compel the District Court to grant post conviction relief on any of the contentions advanced by the defendant.

Some mention should be made of the posture of the case at the time counsel was appointed to represent the defendant. After his arrest, the defendant had, on a number of occasions, admitted committing the murder. The police had assembled a mass of evidence, circumstantial and direct,

which identified the defendant as the murderer. Counsel testified that the defendant, at his first interview, said "quite frankly that he wanted to plead guilty, get it over with." In other words, the defendant did not claim that he was innocent, gave counsel no facts which could be the basis for a defense, and was of little help in any of the preparations for trial. Against this background, defendant's claims made now that he did not have adequate assistance of counsel are not persuasive.

The judgment of the District Court is affirmed.

AFFIRMED.

29-3001. Post conviction; motion; procedure; costs. A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of sections 29-3001 to 29-3004 shall be civil in nature. Costs shall be taxed as in habeas corpus cases.

A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

APPENDIX "B"